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No. 90-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al,*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOE L. ALLEN, JR.*
RAY N. STEVENS
ARLENE D. HAND
PO Box 125
Columbia, SC 29214
(803) 737-4430
Attorneys for Respondents

*Counsel of Record

QUESTIONS PRESENTED

1. Does this case present a substantial federal question?

2. Was the holding of the South Carolina Supreme Court that the refunds be denied also premised upon an alternate and independent state ground?

3. Does the holding of the South Carolina Supreme Court which prospectively applied the decision of this Honorable Court in *Davis v. Michigan Dept. of Treasury*, _____ U.S. _____, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), satisfy the test for such application as set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)?

4. Does the amendment to Section 12-47-440 of the South Carolina Code of Laws by Section 12-47-445 deprive the petitioners of any vested rights?

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STATEMENT OF THE CASE

The South Carolina income tax statutes for the years involved, 1985 through 1988, provided a three thousand ($3,000) dollar deduction of retirement income for persons retired from employment or service with the United States Government. The income of a person retired from state service was exempt in its entirety. Such taxation was declared invalid in *Davis v. Michigan Dept. of Treasury*, supra.

The Court's decision was issued on March 28, 1989, and the State thereafter amended its statute for the 1989 and subsequent years. The income of state retirees is now taxed except for the same three thousand ($3,000) dollar deduction provided federal retirees.

The petitioners, retired federal employees or service persons, instituted this action on April 4, 1989, six days after the *Davis* decision to recover the tax paid on their retirement income for the 1985 through the 1988 tax years.[1]

The South Carolina Supreme Court held that the refunds could not issue because the Davis decision was to have prospective application. It further held that notwithstanding the prospective application of *Davis*, the petitioners could not recover the taxes because the payments were voluntary and not made under protest.

MISSTATEMENTS IN THE PETITION

In accordance with the admonishment of Rule 15 of this Honorable Court, the respondents respectfully submit that the petition incorrectly or fails to state the following:

1. That the taxes sought to be recovered were voluntarily paid.

2. That there is no constitutional requirement that voluntarily

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[1] A separate action is pending in the South Carolina courts for the refund of the taxes paid by retired military officers for the tax years 1945 through 1988.

paid taxes be refunded.

3. That the petition incorrectly states that the remedy provided by Sections 12-47-210 and 12-47-220 of the South Carolina Code of Laws to pay the taxes under protest had not been argued or briefed and first appeared in the South Carolina Supreme Court's Opinion of July 31, 1990. (Petitioners' Brief pp. 4 and 19). The respondents, in paragraph 18 of their answer, in part, alleged that:

> "... The plaintiffs were afforded an adequate and complete remedy under Sections 12-47-210 and 12-47-220 and having failed to comply therewith, have forfeited any rights to maintain the action or to recover the taxes." (Tr., p. 17)

The substance of the above quotation was also stated by the Chairman of the South Carolina Tax Commission in his Affidavit in Opposition to the Petitioners' Motion for Summary Judgement and in support of the respondents' Motion. (Tr., p. 57) These statutes and the remedy there provided were also argued in the respondents' written brief and their oral argument below.

Notwithstanding the above, the Court can judicially note the laws of the State and of the United States and obviously can review prior decisions.

4. That the petition incorrectly states that "no state law ground independently supports the decision below." (Petitioners' Brief, p. 4) The decision of the South Carolina Supreme Court succinctly states the independent state law. (Petitioners' Brief, Appendix, pp. 8a and 9a)

5. The petition misstates the principle of law established in *Davis* to be that a state could not tax the federal government. (Petitioners' Brief, p. 12) The new principle of law was that a state could not tax the retirement income of a federal retiree at a greater rate than the income of a state retiree.

6. The petitioners incorrectly allege that the federal government

subsidized the retirement benefits of state employees. (Petitioners' Brief, pp. 14 and 15) The record establishes that the tax being voluntarily paid was expended by the state for public purposes and that the federal retirees benefited from such expenditures. The federal government has in no way subsidized the State Retirement System. The payments were made by the federal retirees and not the federal government. The theory that the federal treasury was somehow depleted because the federal retirees may have filed federal tax returns and claimed a deduction of the state taxes is far reaching and speculative. The federal government, under such speculation, would also share some of the responsibility. It could have denied the deductions on the ground that the tax was not legally due. For the years involved, the state retirees under the petitioners' hypothesis in fact enriched the federal treasury. There was no state income tax on their income and hence no deduction existed for purposes of federal income taxation. By reason of the exemption, the state retirees would have paid a greater federal tax.

7. The petition incorrectly states that a prospective application of *Davis* gives the state a "naked financial incentive to collect [unconstitutional] taxes." (Petitioners' Brief, p. 15) There is no evidence in the record to support this statement. Further, the record establishes (Tr., p. 56) that the unlawful taxation was not known until the *Davis* decision. A presumption that South Carolina will intentionally violate the Constitution and laws of the United States should not be accepted nor entertained.

8. The petitioners incorrectly state that this Court in *McKesson v. Division of Alcoholic Beverages & Tobacco,* 110 S.Ct. 2238 (1990), held that taxpayers "must be afforded a clear and certain postdeprivation remedy." (Petitioners' Brief, p. 18) This Court did not hold as there stated. A remedy to pay under protest such as Sections 12-47-210 and 12-47-220 satisfies all constitutional requirements.

9. That the petition incorrectly states that the signatures of the Chief Justice and Associate Justice of the South Carolina Supreme Court are illegible. (Petitioners' Brief-Appendix, pp. 10(a), 11(a)

and 20(a)) The signatures on the opinions and order of the Court are legible and reflect the signatures of The Honorable George T. Gregory, Chief Justice; The Honorable David W. Harwell, Associate Justice; The Honorable A. Lee Chandler, Associate Justice; The Honorable Ernest A. Finney, Jr., Associate Justice; and The Honorable Jean H. Toal, Associate Justice.

10. The petition infers that the South Carolina Tax Commission incorrectly advised federal retirees that refunds would issue if claims were filed. (Petitioners' Brief, p. 18) Instead, each of the notices published by the Commission advised the retirees that the Tax Commission could not authorize or direct the refunds.

11. That the petition states on page 18 that "the South Carolina Supreme Court had held, as recently as 1987, that 'voluntary' payments of unconstitutional taxes could be recovered through the statutory method chosen by petitioners. *(Multi-Cinema, Ltd. v. South Carolina Tax Commission,* 357 S.E.2d 6 (S.C. 1987.)" The case cited by the petitioners concerned an admissions tax to view x-rated movies, which was a "license tax" under South Carolina law, Section 12-21-2710. The section was held to be unconstitutional.

ARGUMENT I

THE PETITION SHOULD BE DISMISSED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL ISSUE.

The taxes herein sought to be recovered were voluntarily paid. It is settled that there is no constitutional right to recover a tax that is voluntarily paid. [2]

Because there is no constitutional right to recover taxes voluntarily

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[2] This issue with case citation is treated in 84 C.J.S., *Taxation,* Section 635, p.1277, et seq., 72 Am.Jur.2d, *State and Local Taxation,* Section 1080, p. 341, et seq., 48 A.L.R. 1381 and 74 A.L.R. 1301, see also *City of Columbia v. Peurifoy,* 148 S.C. 349, 146 S.E. 93 (1928) and *United States v. New York and Cuba Mail Steamship Company,* 200 U.S. 488, 26 S.Ct. 327 (1906).

paid, there is no substantial federal question here involved.

The only federal issue presented is whether the South Carolina Supreme Court's prospective application of the decision in *Davis v. Michigan Dept. of Treasury*, supra, was correct.

In *American Trucking Association, Inc. v. Smith*, 110 S.Ct. 2323 (1990) at p. 2331, this Court held that this presented "a federal question." We submit that the South Carolina Supreme Court's prospective application was correct. Assume, however, for purposes of argument that the Court's prospective application was incorrect. The question must then be asked, "where under such circumstances is the substantial federal question?" We submit that there is none. The tax was voluntarily paid for tax years prior to *Davis* and because of such, there is no substantive federal question for this Court to consider. At most, an incorrect prospective application of *Davis* would result in harmless error. The petitioners cannot recover the taxes since they failed to pay the same under protest.

The first question the petition presents is not whether the prospective application of *Davis* was correct. It is what constitutional or federal right do the petitioners have to recover a tax they voluntarily paid. There is none and hence the petition should be denied.

The petitioners, under South Carolina law, Sections 12-47-210 and 12-47-220, had the right to pay the taxes under protest and to recover the same in an action at law.[3] Had the petitioners paid the taxes under protest, neither they nor the state would be faced with the tremendous financial impact this case presents. The state would have had knowledge of the alleged illegal collection and could have escrowed the tax. The tax would not have gone into the general funds of the state and been expended for the benefit of all of the state's citizens, including the petitioners. This remedy was provided

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[3] It is further submitted that these sections satisfy the standard set forth by this Court in *McKesson Corp. v. Divison of Alcoholic Beverages and Tobacco*, supra.

by South Carolina law in each of the more than forty years that the tax was paid. [4]

The petitioners, however, did not pursue this remedy and instead made voluntary payments.[5]

ARGUMENT II

THE PETITION SHOULD BE DISMISSED BECAUSE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS ALSO FOUNDED ON INDEPENDENT STATE LAW.

The South Carolina Supreme Court has by express language held that the petitioners' remedy under South Carolina law was to pay the taxes under protest and institute an action to recover the tax.

> "Even were we to examine state law, the federal retirees would be barred from receiving a refund. The proper refund statutes under which the federal retirees should have proceeded are S.C. Code Ann. Sections 12-47-210 and 12-47-220 (1976), which require the taxpayer to pay under protest before bringing a refund action. We have previously stated that the exclusive remedy for the recovery of the erroneous assessment of income taxes is through these 'pay under protest' statutes. See, *Perpetual Bldg. & Loan Ass'n. of Columbia v. South Carolina Tax Commission*, 255 S.C. 523, 180 S.E.2d 195 (1971)."

This is a clear declaration by the South Carolina Supreme Court that the funds could not be granted under state law, notwithstanding the prospective application of *Davis*. This Court should also deny

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[4] Code provisions prior to the 1976 Code were Section 2469 of the 1942 Code of Laws; Sections 65-2661 and 65-2662 of the 1952 and 1962 Code of Laws.

[5] The South Carolina Supreme Court found as a fact that the taxes herein were voluntarily paid and the Court's finding is amply supported by the record.

the petition herein under its holding in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). It was there held that:

> "... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Under this settled rule, the petition should be dismissed.

ARGUMENT III

THE PETITION SHOULD BE DENIED BECAUSE THE SOUTH CAROLINA SUPREME COURT'S PROSPECTIVE APPLICATION OF *DAVIS* WAS A CORRECT AND PROPER APPLICATION UNDER *CHEVRON OIL CO. V. HUSON*, SUPRA.

In *Chevron*, this Court established a three prong test to determine when its decisions would have prospective application. Each of the three factors is here satisfied.

The First Factor

The South Carolina Supreme Court found, "The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to retirement income of a federal employee". *Davis* established a new principle of law and was a case of first impression. Further, it is illogical to argue that *Davis* was a restatement of law that was clearly foreshadowed because of the decisions in *McCulloch v. Maryland*, 4 Wheat 316 [4 L.Ed. 579] (1819); *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938) or *Graves v. New York, ex rel O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). [6] The genesis of the *Davis* holding was not there founded nor was it stated in *Zucker v. United States*,

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[6] *McCulloch* held that the State could not tax property of the federal

758 F.2d 637, cert. denied 474 U.S. 842, 106 S.Ct. 129, 88 L.Ed.2d 105 (1985), *Kizas v. Webster*, 227 U.S. App. D.C. 327, 707 F.2d 524 (1983) cert. denied 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984) or *Clark v. United States*, 691 F.2d 837 (CA7, 1982). None of these cases dealt with the issue of the state taxation of the income of a retired federal employee. In *Zucker v. United States*, supra., the issue involved cost of living increases and whether Congress could amend or modify existing law so as to reduce the increases. In commenting on the question of whether retirement income was deferred compensation, the Court by dictum stated:

> "The legislative history lends some support to the view that the basic annuity was intended as deferred compensation ..." p. 639.

The Court, on page 639, also stated:

> "This Court does not reach the question of the compensatory nature of the basic annuity to which the retiree became entitled upon retirement ..." p. 639.

The Court did say in *Zucker* that there was case law that could be construed to support a concept of deferred compensation (p. 639) and cited *Steinberg v. United States*, 163 F.Supp. 590, 143 Ct.Cl. 1 (1958) as its authority. It is respectfully submitted that the language in *Steinberg* is somewhat conflicting. The Court held:

> "The right of a Federal employee to an annuity is not born of a contractual relationship between the government and the employee, but is more in the nature of a gratuity granted in appreciation for long and faithful service ... Although an annuity is paid for past, as distinguished from present services, the legal relationship between the

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government. *Helvering* and *Graves* treated the taxation of income of employees of the federal and state governments. Taxation of the income of federal retirees was not there considered.

parties is in all material respects parallel ..."

Steinberg concerned the issue of whether Congress could deny the annuity to a person who refused to testify before a grand jury. It did not treat Section 4 U.S.C. 111 or the doctrine of intergovernmental tax immunity.[7]

The second case of *Kizas v. Webster*, supra, related to the Federal Bureau of Investigation's modifications of a policy for appointment to the position of Special Agent. The issue was whether employees had vested property rights under the policy. That decision did not treat the question that is here involved.

The case of *Clark v. United States*, supra, concerned allegations of discrimination because federal retirees received a cost of living adjustment while none was provided to state and private pensioners. It was alleged that this denied equal protection and due process. The Court held otherwise and found no discrimination. Again, we respectfully submit that the Court did not there address the issue of whether 4 U.S.C. 111 applied to retirement benefits.

By reason of the above, there was no reasonable basis on which the respondents could have reasonably contemplated that its taxing statutes abridged the provisions of 4 U.S.C. 111.

The *Davis* decision was thus not clearly foreshadowed.[8] Surely under the facts as here exist, the respondents are not to be held to an exact standard of interpreting existing law when the statute does not upon its face clearly apply to the factual matter involved. Frequently, there are different views and interpretations of the language of statutes when the statutes do not by clear

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[7]A gratuity is a gift and not payment for services rendered. Retirement income cannot be both a gratuity and deferred compensation.

[8]In South Caolina, this tax had been voluntarily paid since 1945, a period of almost 45 years. Neither the retirees in South Carolina nor the State knew or suspected the taxation to be unlawful.

language address the specific issue.[9] There was no clear rule of law prior to *Davis* and hence *Davis* could not have been "clearly foreshadowed." The first prong of *Chevron* was thus satisfied.

The Second Factor

The state promptly eliminated the discriminatory taxation by taxing the retirement income of retired state employees in like manner as the retirement income of federal retirees.

The prior history in South Carolina was the voluntary payment of the tax for almost 45 years. The tax so collected was appropriated each year for the benefit of all of the state's citizens, including the federal retirees. A prospective application of *Davis* can in no way retard its operation. A retrospective application of *Davis* will not further the holding that discrimination in the taxation of retirement income is prohibited. In this case, it would primarily serve to punish the majority of the state's taxpayers by requiring them to fund repayment of taxes that were in good faith and voluntarily paid. The second prong is satisfied.

The Third Factor

The language of the South Carolina Supreme Court correctly addresses this factor. The Court held:

> " ... If Davis is applied retroactively, the State faces liability for approximately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits

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[9]It should be noted that three different courts in Michigan and His Honor Justice Stevens of this Honorable Court held that the Michigan statute did not offend 4 U.S.C. 111.

> have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State."[10]

The record reflects that approximately 62,000 retired federal civil service annuitants and retired military persons filed tax returns with the state. It further reflects that approximately two hundred million ($200,000,000) dollars is involved in the action. The federal retirees represent just under 2% of the state's population.[11]

The refund claims approximate 5.95% of the state's appropriated general funds for the 1988-89 fiscal year.[12] It would be inequitable to apply *Davis* retrospectively and to require the refund of this large sum that was voluntarily paid at the expense of the vast majority of the state's population. If the refunds are to issue, it is obvious that the current level of services provided to all the state citizens, including the retirees, would of necessity have to be reduced or added taxes levied. In these claims, it is not Mr. Davis, the person initially contesting the tax, who prosecutes this action. Instead, the claimants are those persons who for a long period of time voluntarily paid the tax and received whatever benefits flowed from the tax payments in the form of public expenditures for public purposes. Those persons seek the refund of the tax at the expense of the State Treasury, which obviously is funded by the state's taxpayers. This inequitable result to all the state's taxpayers is avoided by the prospective application of the *Davis* decision.

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[10]An action to recover a tax is an action at law nonetheless the same is governed by equitable principles. *Stone v. White*, 57 S.Ct. 851, 301 U.S. 532, 81 L.Ed. 1265 (1937).

[11]The 1980 census listed the State's population at $3,121,820.

[12]The State's appropriated general funds for the 1989-90 fiscal year were $3,363,385,451. Act 189, Acts of 1989, Section 127, Recapitulation.

The reasoning of the Court in prospectively applying the decision in *Arizona Governing Committee, etc. v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983), is equally applicable to this case. The Court there held that the retirement program of the State of Arizona discriminated against female retirees. Retrospective application of the decision, however, was denied because of the adverse results such an application would create. In other words, the adverse effect to the state and its taxpayers outweighed any disadvantage to the retirees. This would be the circumstance in South Carolina should the *Davis* decision be retrospectively applied and the State be required to refund the two hundred million ($200,000,000) dollars.

The equity here involved warrants prospective application and the third prong is thus met.

ARGUMENT IV

THE AMENDMENT TO SECTION 12-47-440 BY SECTION 12-47-445 DOES NOT DEPRIVE THE PETITIONERS OF ANY VESTED RIGHTS.

The South Carolina Supreme Court did not directly address this issue, however, the petitioners argue that the amendments to Section 12-47-440 by Section 12-47-445 of the South Carolina Code of Laws denied them vested rights. Section 12-47-445 limited the right to claim and sue for the refund under Section 12-47-440 to nonconstitutional or nonlegal errors. This the petitioners contend deprives them of a vested constitutional right. The petitioners, however, have no vested rights in the continuation of a law that provides for the refund of a tax that is voluntarily paid.[13] The general

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[13] In South Carolina, a statute that provides a remedy to contest a tax that is involuntarily paid or paid under protest stands on a different footing than a statute for the recovery of taxes that were voluntarily paid. *Duke Power Co. v. South Carolina Tax Commission*, 81 F.2d 513 (1936).

rule is stated in 73 Am.Jur.2d, *Statutes*, Section 389, as follows:

> "Under the common law, if a statute is unconditionally repealed without a saving clause in favor of pending suits, all pending proceedings thereunder are terminated. This is true of the repeal of a law relating to procedure, or of a law conferring jurisdiction, in which case the right to proceed further in an action that is pending but undetermined at the time of the repeal is taken away. Moreover, in the absence of any constitutional saving clause, a judgment rendered by virtue of the terms of a statute which is repealed is void, although the proceedings may have been commenced before the repeal ..."

In *South Carolina v. Gaillard*, 101 U.S. 433, 25 L.Ed. 937 (1879), this Court followed this rule and held:

> "... it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after ..."

In a later case, *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952), the Court favorably quotes from *Merchants' Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L.Ed. 540 (1867), as follows:

> "It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction."

Certiorari was denied by this Court in two cases wherein the issue was the right of a state to repeal a statute that provided for the refund of taxes. *Southern Service Company v. Los Angeles*, 97 P.2d 963, 15 Cal.2d. 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 61, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421,

and *Sears Roebuck & Co. v. Lundheimer*, 371 Ill. 367, 21 N.E.2d 318, 124 A.L.R. 1472, appeal dismissed 60 S.Ct. 112, 308 U.S. 505, 84 L.Ed. 432, rehearing denied 60 S.Ct. 137, 308 U.S. 636, 84 L.Ed. 529.

The California and Illinois Courts held, inter alia, that a person had no vested rights in the continuation of a statute for the recovery of a tax. Here the petitioners voluntarily paid the taxes and hence have no vested rights to recover the tax.

> "It is firmly established that there is no vested right in any particular mode of procedure or remedy, and it is a general rule that where a statute giving a particular remedy is unqualifiedly repealed, the remedy is abrogated. Indeed, where a statute giving a special remedy is repealed by a later act which substitutes nothing in its place, the effect is to obliterate such statute as completely as if it had never been passed." 73 Am.Jur.2d, *Statutes*, Section 388. (See also 16A Am.Jur.2d, *Constitutional Law*, Section 671.)

The same authority in Section 672 at page 657 states the rule as follows:

> "A statutory right of action, whether based on a state or federal statute, may be taken away after it has accrued or is being enforced, and if the repealing statute contains no saving clause the rights are lost to the holders. The right to abolish a cause of action has, in some cases, been based upon the fact that the particular cause of action does not exist at common law. The justification for this rule is that statutory causes are pursued with the full realization that the legislature may abolish the right to recover at any time."

A waiver of the state's immunity to suit must be strictly construed. *United States v. Michel*, 282 U.S. 656, 51 S.Ct. 584 (1931), *Bomar v. Spartanburg*, 181 S.C. 453, 187 S.E. 921 (1936), *United States v. Livingston*, 179 F.Supp. 9 (1959) affd. 364 U.S.

855, 80 S.Ct. 1611, 42 L.Ed.2d 1719 (1960).

The petitioners have thus not been deprived of a vested right and hence the petitioners' argument is without merit.

CONCLUSION

The petition should be denied because there is (a) no substantial federal question involved, (b) the refunds cannot issue under separate and independent state grounds (c) the South Carolina Supreme Court's prospective application of the *Davis* decision was correct, and (d) the amendment to Section 12-47-440 by Section 12-47-445 does not deprive the petitioners of any constitutional rights.

Respectfully submitted,

JOE L. ALLEN, JR.*
RAY N. STEVENS
ARLENE D. HAND
Post Office Box 125
Columbia, South Carolina 29214
(803) 737-4430
Attorneys for Respondents

* Counsel of Record

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APPENDICES

APPENDIX A

Section 12-47-210

When the State or any county charges or levies any tax whatsoever against any person upon the books of any county treasurer of the State or any tax is assessed by the Commission and such treasurer or Commission shall claim the payment of the taxes so charged or assessed, or shall take any step or proceeding to collect them, the person against whom such taxes are charged or assessed or against whom such step or proceeding shall be taken, or the then owner of the legal title to property affected by such tax or a mortgagee holding a lien thereon, may, if he conceives such taxes to be unjust or illegal for any cause, pay such taxes, and any penalties thereon, under protest in writing in such funds and moneys as the county treasurer or Commission shall be authorized to receive. Upon such payment being made, the Commission shall pay the taxes and penalties so collected by it into the State Treasury giving notice at the time to the State Treasurer that the payment was made under protest. The county treasurer shall retain all taxes and penalties collected by him. The full faith and credit of the county is pledged as security for such funds.

APPENDIX B

Section 12-47-220

Any person paying any taxes under protest may at any time within thirty days after making such payment, but not afterwards, bring an action against the county treasurer or the Commission, as the case may be, for the recovery thereof, in the case of a county treasurer in the court of common pleas for the county in which such taxes were payable and in the case of the Commission in any county having jurisdiction, and, if it be determined in such action that such taxes and penalties, if any, were wrongfully or illegally collected for any reason going to the merits, the court before whom the case is tried shall certify of record that such taxes were wrongfully collected and ought to be refunded and thereupon the county treasurer shall refund the taxes and penalties, if any, so paid to him or, in the case of any taxes levied or assessed by the Commission shall issue its order to the State Treasurer to refund such taxes and penalties, if any, so paid, which shall be paid in preference to other claims against the State Treasury.

APPENDIX C

Section 12-47-440

Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extension of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid. Such action shall be brought in the court of common pleas for Richland County except that a resident of this State may elect to bring said action in the court of common pleas for the county of his residence. A taxpayer or licensee who brings an action provided for in Sections 12-47-210 and 12-47-220 shall be considered as having elected his remedy and is denied the benefits of this section.

APPENDIX D

Section 12-47-445

The provisions of Section 12-47-440 do not apply to claims for abatement or refund resulting from a decision of a court of competent jurisdiction declaring a tax law of this State unconstitutional or otherwise unlawful. For purposes of this section, a final decision is the decision of a court declaring the law unconstitutional or otherwise unlawful and from which the appropriate officials of this State cannot or do not take an appeal or request a rehearing.